2013 IL App (1st) 121327-U

Third Division
November 20, 2013

No. 1-12-1327

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	02 CR 04055 (05)
	)	
ALBERTO ZAVALA,	)	Honorable
	)	Colleen Ann Hyland,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: When a defendant swears, in an affidavit supporting a postconviction petition, that he rejected a plea bargain because his counsel misrepresented the range of possible sentences the trial court could impose if it found him guilty as charged, and he swears that the prosecution offered to recommend to the court a sentence of substantially less time than the minimum sentence available if the court found him guilty as charged, the defendant has made a substantial showing of a violation of his right to the effective assistance of counsel, and the trial court must hold an evidentiary hearing on the defendant's postconviction petition.

¶ 2 This case arises on appeal from a second-stage dismissal of a postconviction petition. The

trial court, after a bench trial, found the defendant, Alberto Zavala, guilty of murder and home invasion, both committed with a firearm. The court imposed the statutory minimum sentence of 56 years for the charges, and this court affirmed. *People v. Zavala*, No. 1-07-0287 (2008) (unpublished order under Supreme Court Rule 23). In his postconviction petition, Zavala alleged that his trial counsel's failure to inform him of the minimum sentence he faced if the trial court found him guilty as charged led him to reject two plea agreements the prosecution offered. The trial court dismissed the postconviction petition without holding an evidentiary hearing. We reverse and remand for an evidentiary hearing because Zavala has made a substantial showing that his trial counsel committed unprofessional errors that prejudiced him by causing him to reject the plea agreement.

¶ 3 BACKGROUND

¶ 4 On October 2, 2001, Phillip McGovern answered a knock on his door. Marco Canas, holding a pizza, stood outside next to a second man. McGovern yelled to his fiancé, Maureen Rodak, "did you order a pizza?" Rodak said she had not, and she went to join McGovern at the front door. She saw two men in the living room, and at least one pointed a gun at McGovern. When McGovern went outside with the men, Rodak ran to the bedroom to get McGovern's gun. Canas came into the house to find Rodak. Rodak came into the hall and aimed McGovern's gun at Canas, who aimed his gun at her. They shot at each other and Rodak ducked. A few minutes later, the men left and McGovern stumbled back into his house and fell on the floor, bleeding profusely from a large bullet wound to his chest. He died from the wound.

¶ 5 Police found Canas's fingerprints on a pizza bag in McGovern's home. A few days after the shooting, police showed Rodak arrays of photographs to see if any looked like the men who came

to the door with the pizza. She chose photographs of Canas and Leonardo Delavega as pictures of the men she saw. Police interrogation of Canas led officers to arrest Alfredo Herrera and Zavala in connection with McGovern's murder. On January 24, 2002, the police videorecorded a statement from Zavala. In the recorded statement, Zavala admitted that in September 2001, he, Herrera, Delavega, Canas, Robert Orosco and Chuck Conrick decided to rob McGovern. On October 2, 2001, Zavala drove Orosco to McGovern's home, while Herrera drove the others. On the way to McGovern's, Orosco asked to stop at a pizza place, where he bought a pizza. Orosco told Zavala Canas would pose as a delivery man to get McGovern to open his front door. According to the recorded statement, Zavala and Orosco passed McGovern's home and signaled Herrera in the other car to go ahead with the robbery. Zavala and Orosco drove away before the other men attempted the robbery. The men later told Zavala that Delavega shot McGovern during the botched robbery attempt.

¶ 6 A grand jury indicted Zavala, Herrera, Delavega, Canas, Orosco and Conrick for first degree murder and home invasion. Zavala hired private counsel to represent him in the proceedings. Canas pled guilty in exchange for a sentence of 29 years in prison, and Herrera reached a plea bargain for a 20 year sentence. Zavala's attorney engaged in plea discussions with prosecutors, but the parties reached no agreement. The case went to a bench trial.

¶ 7 The prosecutors relied on Rodak's testimony, which did not mention Zavala, and Zavala's recorded statement. The trial court found Zavala guilty of first degree murder and home invasion.

¶ 8 At the sentencing hearing, Zavala's attorney asked the court to sentence Zavala to a term of 20 years in prison, which the attorney characterized as the statutory minimum. The prosecution

asked for a sentence of 40 years. The trial court held that because the evidence proved the use of a firearm in the commission of both the murder and the home invasion, the applicable statutes required the court to enhance the sentences for both murder and home invasion by 15 years. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2000); 720 ILCS 5/12-11(a)(3), (c) (West 2000). Another statute required the sentences for the crimes to run consecutively. See 730 ILCS 5/5-8-4(a)(i) (West 2000). Therefore, the court held that the law required a minimum sentence of at least 56 years, consisting of 20 years for murder plus a 15 year enhancement and 6 years for home invasion with another 15 year enhancement, all running consecutively. See 730 ILCS 5/5-8-1(a)(1)(a), 5-8-1(a)(3) (West 2000). The court imposed the minimum sentence of 56 years.

¶ 9 On the direct appeal, Zavala challenged only the application of the firearm enhancement to his sentences. This court affirmed the convictions and sentences. *Zavala*, No. 1-07-0287.

¶ 10 Zavala filed a postconviction petition, and, with the assistance of counsel, he filed an amended postconviction petition on June 10, 2011. He alleged that his trial counsel provided ineffective assistance, and he supported the allegation with his affidavit. In the affidavit, he said that the prosecution offered to request a 10 year sentence for Zavala if Zavala agreed to testify against one of his co-defendants. Zavala said:

> "My attorney never mentioned anything about enhancements or consecutive sentences being applied to me if I refused this offer, and had I known about the consecutive sentencing or enhancements, I would have accepted that Offer."

¶ 11 According to the affidavit, the State later offered to ask for a 20 year sentence, with no further

requirements, if Zavala pled guilty. Zavala again refused, because his attorney did not tell him about the enhancements or consecutive sentencing.

¶ 12 The State moved to dismiss the petition. The trial court granted the State's motion, holding that because Zavala did not assert that his attorney said anything about enhancements or consecutive sentencing, he had not shown that counsel misinformed him, so he had not substantially shown a deprivation of constitutional rights. Zavala now appeals.

¶ 13 ANALYSIS

¶ 14 We review *de novo* the dismissal of a postconviction petition at the second stage of postconviction proceedings. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2007). At this stage of postconviction proceedings, the court must assume the truth of all facts alleged in the postconviction petition and its supporting documents, unless the record contradicts the allegations. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 The record on appeal shows that after the trial court found Zavala guilty of both home invasion and intentional first degree murder, Zavala's attorney argued that the court had authority to impose a sentence of 20 years in prison, and even the prosecutor argued for a sentence of 40 years in prison. The record supports the conclusion that, for the plea discussions, Zavala thought he faced a minimum sentence of 20 years if the court found him guilty as charged, when in fact he faced a minimum sentence of 56 years in prison on those charges.

¶ 16 The attorney in *People v. Curry*, 178 Ill. 2d 509 (1997), similarly failed to inform his client accurately about the possible range of sentences he could face if the court found the defendant guilty as charged. In *Curry*, as here, the attorney apparently did not know his client faced mandatory

consecutive sentences, and the attorney advised his client in accord with his misunderstanding of the law. The *Curry* court said:

> "A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer. [Citations.] Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged. [Citations.] In the case at bar, defense counsel did not fulfill this obligation.***.
>
> *** Based on the facts before us, we conclude that defense counsel's performance during plea negotiations was objectively unreasonable." (Emphasis in original.) *Curry*, 178 Ill. 2d at 528-29.

In accord with *Curry*, we find that the allegations of Zavala's postconviction petition, taken as true, make a substantial showing that his counsel's performance fell below an objective standard of reasonableness.

¶ 17 The State argues that Zavala's self-serving assertion in his affidavit cannot suffice to show he would have accepted the offered plea had he known the real risks he faced by going to trial. In *Curry*, on a direct appeal from three convictions with sentences of four years each, to be served consecutively for a total of a 12 year sentence, the parties stipulated that the defendant would testify that he would have taken the plea bargain for a four year sentence if he had known the law required consecutive sentences for the charges brought against him. The *Curry* court said that the defendant's

self-serving testimony alone would not sufficiently prove that he suffered prejudice due to his counsel's erroneous advice. The *Curry* court reversed the convictions and remanded for a new trial because the defendant's attorney supplied a supporting affidavit. In the affidavit, counsel admitted that he mistakenly advised the defendant that the court would probably sentence him to a term of four years in prison if it found him guilty as charged. Counsel added that the defendant rejected the plea offer based on the erroneous advice about the minimum sentence.

¶ 18 Zavala has only his own affidavit to support his postconviction petition. Zavala claims that his affidavit, at least in the context of the extreme disparity between the offer and the actual minimum sentence if the court found him guilty as charged, substantially shows that his counsel's ineffective assistance had prejudicial effect, and therefore it meets the standard applicable to require the trial court to hold an evidentiary hearing on his postconviction petition.

¶ 19 The defendant in *Curry* needed to meet a different standard. See *Curry*, 178 Ill. 2d at 519. Curry, for his direct appeal, needed to establish prejudice well enough to obtain a new trial. *Curry*, 178 Ill. 2d at 518-19. Here, Zavala only needed to make a substantial showing of ineffective assistance of counsel, to persuade the court to hold an evidentiary hearing to determine whether to award him a new trial. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). To support the claim in his petition for ineffective assistance of counsel with evidence other than his own affidavit, Zavala would need an affidavit from his trial counsel, confessing to the asserted legal error and the incompetent assistance. Our supreme court has held that courts should excuse the absence of similar affidavits in which attorneys must confess their errors, because the "difficulty or impossibility of obtaining such an affidavit is self-apparent." *People v. Williams*, 47 Ill. 2d 1, 4 (1970), quoted in

People v. Hall, 217 Ill. 2d 324, 333-34 (2005).

¶ 20 The petitioner in *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1391 (2012), like Zavala, supported his *habeas corpus* petition with only his own testimony that he would have accepted a plea bargain the prosecution offered if his attorney had informed him correctly about the law. The district court found that evidence sufficient to show prejudice, and the court of appeals affirmed that finding. *Cooper v. Lafler*, 376 Fed. Appx. 563, 571-72 (6th Cir. 2010). The United States Supreme Court adopted the appellate court's finding. *Lafler*, 132 S. Ct. at 1391. The fact that Zavala faced a minimum sentence more than five times the length of the State's initial offer lends credibility to Zavala's assertion. See *Lafler*, 132 S. Ct. at 1391.

¶ 21 We find that in the context of the great disparity between the State's offer in the plea bargain, and the minimum sentence Zavala faced if the court found him guilty as charged, Zavala's affidavit suffices to make a substantial showing that he would have accepted the plea bargain if his counsel had informed him about the statutory requirements for enhancement and consecutive sentencing.

¶ 22 Finally, the State argues that Zavala suffered no prejudice because the trial court could not legally impose the promised sentences of 10 or 20 years, and the court actually imposed the statutory minimum sentence. For this argument, the State relies on the fact that the record does not include an explicit statement by the assistant State's Attorney that he agreed to reduce or *nol pros* any of the charges. The record does not show what the State agreed to do in the discussions that ended with the State offering to recommend a sentence of 10 or 20 years in prison. Canas and Herrera, who faced exactly the same charges Zavala faced, reached plea bargains that resulted in sentences of 29 years for Canas and 20 years for Herrera. Those sentences amounted to about half, and about one-

third, respectively, of the statutory minimum sentences those defendants faced if the court found them guilty as charged. From the offer to recommend a term of 10 or 20 years, we infer that the State agreed to appropriate concessions to make those sentences possible. For example, the State could have agreed to avoid any mention of firearms in proving up the crime, and the State could have *nol prossed* either the home invasion or the murder charge. We cannot say from this record that the court could not have imposed a valid sentence of 10 years or 20 years on Zavala for an appropriate plea.

¶ 23 CONCLUSION

¶ 24 Zavala has made a substantial showing that his trial counsel provided ineffective assistance when counsel failed to inform Zavala about the range of possible sentences Zavala faced if he rejected the prosecutor's offer and went to trial. Zavala has also sufficiently shown that he suffered prejudice due to his counsel's unprofessional error. Therefore, we remand the case for an evidentiary hearing.

¶ 25 Reversed and remanded.